No. 2878

United States
Circuit Court of Appeals
For the Ninth Circuit

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,

Appellees.

Brief of Appellants

Upon Appeal from the United States District Court for the District of Montana

MC KEE PTG. CO., BUTTE, MONT.

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STATEMENT OF CASE.

On April 8, 1916, there was commenced in the District Court of the United States for the District of Montana, equity side, an action wherein First Trust and Savings Bank and Emile K. Boisot, as Trustees, appellees in this court, were named as complainants, and these appellants Hans B. Knudsen and Caroline Knudsen, together with Bitter Root Valley Irrigation Company, F. C. Webster, as Trustee in bankruptcy of that company, Helen E. Carter, Max

Bennett, Henry Bennett, Joseph Zitka and W. C. Parks were named as defendants. (Tr. p. 2, ll. 1-20.)

As far as concerns this appeal the defendants Max and Henry Bennett, Carter, Zitka and Parks require and shall receive no consideration.

The Bitter Root Valley Irrigation Company(hereinafter referred to as the Bitter Root Company) was, during all of the times hereinafter referred to, and now is a Montana corporation (Tr. p. 3, ll. 20-23); under date of January 3, 1916, upon a voluntary petition therefor filed in the said District Court of the United States an order was made, adjudging this company a bankrupt, and under date of February 23, 1916, F. C. Webster was appointed as trustee in bankruptcy thereof. (Tr. p. 132, ll. 9-22.)

On or about June 1, 1909, and continuing thereafter until January 3, 1916, the date of the bankruptcy adjudication, this Bitter Root Company owned, or had possessory rights to large quantities of land located in Ravalli County, State of Montana, the total quantity at one time and another in which it was so interested being around forty thousand acres, and of which total it had prior to January 3, 1916, sold or contracted for sale about twenty-two thousand acres; also during said times it owned or had possessory rights to the use of certain waters for irrigation purposes. (Tr. p. 4, l. 1 and pp. 122-124.)

On June 1, 1909, the Bitter Root Company made, executed and delivered to appellees a trust deed to secure

a bond issue of $1,376,000.00, assuming by said trust deed to create a lien upon all of its properties. (Tr. pp. 6-10.) Default being made in payments required by the trust deed, upon request of bondholders the action above mentioned was instituted to bring about a foreclosure of the trust deed and a sale of the properties covered thereby (Tr. pp. 103-105).

As may be determined from the bill of complaint, this proceeding is not one of and in the bankruptcy matter, but is entirely independent thereof.

The appellants in this court (made defendants in the United States Court because of a reputed interest in the properties of the Bitter Root Company), after disposition of motions and demurrers, filed, on September 4, 1916, their answer to the bill of complaint (Tr. p. 117, ll. 25-28). By this answer the relation of appellants to the controversy is shown. They are the purchasers of land and water rights from the Bitter Root Company and under date of June 24, 1915 (over six months prior to the bankruptcy adjudication above mentioned), instituted an action in the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli, on behalf of themselves and of all other purchasers of lands and water rights from the Bitter Root Company who were similarly situated, against said Bitter Root Company, against appellees named above, and against other persons and corporations reputed to

have an interest in the properties of the Bitter Root Company (Tr. pp. 122-129).

Further by said answer it is made to appear that (a) The State Court last mentioned is a court having jurisdiction to determine such matters as are in that suit and in the United States Court sought to be determined; (b) that in making sales of lands owned by it the Bitter Root Company had agreed with appellants and other purchasers that it was constructing and would complete dams, ditches, pipe lines and other water carrying devices sufficient in size to convey waters, the right to the use of which they then owned, or would acquire, in quantities ample to properly irrigate lands to the extent of forty thousand acres; that each of said forty thousand acres of land would be required to pay annually $1.25, thus insuring each year a fund of $50,000.00—this fund to be used for maintenance and up-keep purposes alone; that the $1.25 per acre charge was to be in the nature of and in fact was a covenant running with the land and binding upon all persons owning or claiming the same; and that a right to use the water perpetually should pass with the lands sold; that approximately twenty-two thousand acres of land were so sold and that collections at the rate of $1.25 per acre per year had been made for a number of years; that the Bitter Root Company had used water upon about 3,500 acres of land, being by it cultivated under sales contracts, for several years without making payments, and had

also failed to pay the $1.25 per acre charge upon its unsold lands; also that written agreements of the above tenor had been made and recorded prior to the execution and delivery of the trust deed to complainants, and that complainants and all holders of bonds had notice of such charges against all lands covered by the trust deed.

The answer further charged misappropriation of moneys collected on account of the $1.25 per acre charge, which were collected as a part of a trust fund; that the Bitter Root Company had failed to complete to construction its water carrying system as agreed; that it was suffering the system as partially constructed to become unsafe and unfit for use; that it was without funds to make needed repairs; that without repairs no water could be furnished for perpetual use; that all funds realized from the collections above mentioned and due from the Bitter Root Company as above stated were in fact a trust fund necessary to insure the perpetual use of the waters for irrigation purposes.

(c) That because of these conditions a first and prior lien against the properties of the Bitter Root Company had been created years before and then existed in favor of all persons of the same class as complainants, this lien being directly alleged to be superior in point of time and right to the lien of the bondholders represented by appellees; that the appointment of a receiver of the properties of the Bitter Root Company was necessary to conserve its assets, to sell so

much of the properties of that company as should be required to make good the prior lien and the deficit in the trust funds and to take such action as should be appropriate to work a readjustment of the affairs of the company that would insure the perpetual supply of water agreed to be furnished. (Tr. pp. 122 to 128).

Under date of July 14, 1915, the Bitter Root Company made a *general appearance* in the state court suit; later, and under date of January 31, 1916, appellees made a special appearance in the state court suit; and under date of April 5, 1916, three days prior to the institution of the United States Court suit, the state court overruled the objections raised by the special appearance mentioned and declared its assumption of jurisdiction of appellees so far as was necessary to determine their interests in and to the properties of the Bitter Root Company (Tr. pp. 129-130).

The answer of appellants also contained the allegation that the property and property rights involved in each the state court and United States court were identical (Tr. p. 130); and, "That as appears from the complaint filed in the action pending in the aforesaid State Court it is probable or possible that at some stage of the litigation therein the appointment of a receiver will be necessary to accomplish the execution of the judgment and decree of said State Court and that the receiver so to be appointed must be one of the selection of said State Court and subject alone to its jurisdiction. That in the course of the prosecution of

the aforesaid action now pending in the State Court all matters and issues presented in this subsequently commenced and pending action in this United States Court can be as fully and fairly determined therein as herein and that it is the intention of these answering defendants Hans B. Knudsen and Caroline Knudsen to prosecute and determine in said State Court the issues therein raised and to determine the rights and claims not only of the defendants Emile K. Boisot and First Trust and Savings Bank but of all others in any manner or fashion having or claiming any interest in and to said property."

The relief sought by appellants was in the alternative —that the United States Court suit should remain in *status quo* and that the Trustee in bankruptcy should be directed to appear in the state court suit; or that further proceedings be had in that court without assuming to determine the rights of appellants and subject to such orders as should be made in the State Court respecting the relative rights of the parties (Tr. pp. 132-134).

On September 12, 1916, appellees filed a motion to strike the portions of the answer from which the foregoing statements have been taken; the grounds of the motion were that the matter was irrelevant, redundant, immaterial, sham, and frivolous (Tr. pp. 135-136).

On October 16, 1916, after argument this motion was granted (Tr. pp. 137-140), and subsequently under date of November 16, 1916, an appeal to this court

was allowed by William H. Hunt as a judge thereof.

The question presented by this appeal is: Are the facts stated in the portion of the answer of appellants to which appellees' motion was directed, sufficient to invoke the principles of comity applicable where conflicts of jurisdiction appear?

SPECIFICATIONS OF ERROR.

I.

The District Court erred in making its order or decree of October 16, 1916, as a result whereof there was stricken from the answer of appellants filed in said court and cause under date of September 4, 1916, the portion thereof embraced within paragraph number V and being sub-divided into paragraphs 1, 2, 3, 4, 5 and 6, for the reason that by so doing said court determined contrary to settled law, that such facts as are therein recited fail to disclose a situation requiring the application of principles of comity.

ARGUMENT.

The question presented for decision in this case depends in its final analysis upon whether the institution of such an action as was begun in the state court,—unaccompanied by levy of attachment, physical seizure, or appointment of receiver, but followed by appearance therein of defendants, results in a constructive seizure of the *res*.

As will appear from the transcript and from the statement hereinbefore appearing, the contentions raised in the state court (though not the facts pleaded) by appellants herein were that because of covenants and agreements of the Bitter Root Company there existed in favor of themselves, and all others similarly situated, a lien upon all of the properties of the Bitter Root Company, which lien had been created long before the institution of the action and which lien was prior in right and point of time to that assumed to be created by the trust deed under which appellees were asserting a right to foreclosure in the Federal Court; that funds held by the Bitter Root Company as trustee had been misappropriated and that these funds should in equity be made good from a sale of the assets of the said Company; that a marshalling of the assets of said company was necessary; and that a receiver would have to be apointed by the state court to accomplish these and other results. .It was further asserted by the plea interposed in the District Court of the United States that the Ravalli County State Court had complete jurisdiction in law and equity to determine all these questions; that the property rights and properties involved were the same in each the state and Federal courts; that the Bitter Root Company, appellees and appellants, were the principal parties to each action; that the Bitter Root Company, then in possession of all the properties mentioned, made a general appearance in the state court

suit more than four months prior to the bankruptcy adjudication; that the appellees had made a special appearance more than two months prior to the institution of the Federal court suit, under which appearance the state court had claimed jurisdiction of them for purposes of determining their property rights in the controversy,—also prior to the institution of the Federal court suit; and that there was a *bona fide* intention upon the part of appellants to prosecute the state court litigation to a complete determination of all issues raised therein.

Before passing to a consideration of the matters which really determine the question of the correctness of the ruling of the district court, I call attention to the fact that the motion to strike in this proceeding did not in any fashion, or at all, challenge either the truth of the matters pleaded, nor did it raise any question as to whether the plea was deficient in its statement of facts. The motion only raised the question of whether the matter pleaded was at all material or relevant to the questions raised or to the rights of appellants.

Disposing of what formal objections might be raised,—though they have not heretofore been suggested,—I submit that the interposition in an answer of this form of defense is expressly authorized.

> Rule 29, Rules of Practice for Courts of Equity of United States as promulgated by the Supreme Court of the United States, November 4, 1912.

A recital of the facts set forth in the plea is proper procedure to present the principles upon which appellants relied.

Farmers L. & T. Co. v. *Lake Street E. R. Co.* 177 *U. S.* 51; 44 *L. ed.* 667;

Wabash v. *Adelbert College,* 208 *U. S.* 38; 52 *L. ed.* 379.

Appellants representing a class of litigants having interests in common and of a general character are authorized in each the state court and the Federal court to maintain the action instituted.

"Parties in interest,—when to be joined. When one or more may sue or defend for the whole. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant-the reason therefor being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

Section 6491, *Revised Codes Montana,* 1907.

See also Rule 38 of Rules of Practice, *supra;* and *also Hartford Life Insurance Co. v. Ibs,* 237 *U. S.* 670; 59 *L. ed.* 1165.

The substantial matters requiring consideration are principles of comity applicable in such instances, the effect, if any, of bankruptcy proceedings upon these principles, and the sufficiency of the proceedings in the state court to make for acquisition of such jurisdiction and possession as is requisite to call for the application of the comity doctrine.

I.

THE GENERAL RULE.

The rule is quite recently stated in the case of *Palmer* vs. *State of Texas*, 212 *U. S.* 118, 53 *L. ed.* 435, wherein it is said:

> "If the state court had acquired jurisdiction over the property by the proceedings for the appointment of a receiver and had not lost the same by the subsequent proceedings, then upon well recognized principles, often recognized and enforced by this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction. The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovreignty. If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually

as if the property had been entirely removed to the territory of another sovreignty, Wabash R. Co. v. Adelbert College, 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 182 and previous cases in this court cited therein at page 54."

Of the cases cited in the *Wabash Railroad Company* decision, we cite and call attention to the following as supporting the rule above announced:

Murphy v. *Hoffman*, 211 *U. S.* 562, 53 *L. ed.* 327;
Farmers L. & T. Co. v. *Lake St. E. R. Co.*, 177 *U. S.* 51, 44 *L. ed.* 667;
Heidretter v. Elizabeth etc. Co., 112 *U. S.* 294, 28 *L. ed.* 729;
Byers v. *McAuley*, 149 *U. S.* 608, 37 *L. ed.* 867.
Pickens v. *Roy*, 187 *U. S.* 177, 47 *L. ed.* 128;
Metcalf v. *Barker*, 187 *U. S.* 165, 47 *L. ed.* 122;
Moran v. *Sturges*, 154 *U. S.* 256, 38 *L. ed.* 981.

In the *Palmer* case, *supra*, it appeared that the receiver appointed by the state court never had taken *actual* possession of the *res;* at once after his appointment an undertaking was given by the defendants in the state court suit which had the effect of suspending the order appointing the receiver. Thereupon an action was commenced in the United States Court, the defendant confessed the allegations of the bill, a receiver was appointed and took possession of the *res*. Later, after appeals taken in the state court suit were decided, the officers of the State of Texas appeared in the United States Court and insisted upon delivery of pos-

session to the receiver named by the state court. The rule of comity was recognized and enforced and the Federal court receiver was compelled to surrender possession to the state court.

The rule as announced by the *Palmer* case, *supra,* is too well established to require further comment. Granted the acquisition of jurisdiction and possession of the *res* by one court, freedom from interference by other courts at once is assured. This rule is subject to only one qualification, viz: Instances where, because of authority conferred by the constitution of the United States, Congress has assumed to declare that the jurisdiction of the Federal courts is exclusive upon the subject.

That the instant case is not within the exception is the next matter for exhibition and determination.

II.

THE BANKRUPTCY PROCEEDINGS.

By sub-division 6 of Section 711, U. S. Revised Statutes as now in force, courts of the United States are given exclusive jurisdiction of "all matters and proceedings in bankruptcy." This provision was enacted in pursuance of the grant of power conferred by the constitution upon Congress to enact uniform laws upon the subject of bankruptcy. But this provision does not mean that no courts but United States courts may determine issues with respect to rights in, and to possession of, property of a bankrupt or claimed

to be a part of his estate. That there is a distinction between "matters and proceedings in bankruptcy" and suits with reference to right to property of a bankrupt is recognized by the provisions of the Bankruptcy Act. See Section 11, sub-division (b); Section 23, sub-divisions (a) and (b); Section 60, sub-division (b); Section 67, sub-division (e); and Section 70, sub-division (e). And this distinction has been recognized by the Supreme Court of the United States at various times since the first enactment of a Bankruptcy law.

Peck v. *Jenness, 7 How.* 612; 12 *L. ed.* 841;
Eyster v. *Gaff,* 91 *U. S.* 521; 23 *L. ed.* 403;
Bardes v. *Bank,* 178 *U. S.* 524; 44 *L. ed.* 1175;
Lovell v. *Newman, 227 U. S.* 412; 57 *L. ed.* 577.

In only one particular has Congress assumed to say that where possession of the *res* has been acquired by a state court, such possession is ousted by the adjudication and this is where, *within four months,* liens have been created by legal proceedings had in such courts. Two elements must be present: the lien must be created by the legal proceedings, *and,* it must be created within four months of the date of adjudication. [Section 67, sub-divisions (c) and (e)]. As has been specifically decided by the United States Supreme Court a "judgment or decree, in enforcement of an otherwise valid pre-existing lien, is not the judgment denounced by the statute, which is plainly confined the judgments *creating liens.*" *(Metcalf* v. *Barker,* 187 *U. S.* 165; 47 *L. ed.* 122).

Hence, it is important to note that the lien asserted by appellants was neither created by legal proceedings, nor was it created within four months of the adjudication with respect to the Bitter Root Company.

As a concurrent jurisdiction is recognized as in the Federal and state courts by sections 11, 23, 60, 67 and 70 of the Bankruptcy Act, and as the lien asserted is not one which is at once dissolved upon the adjudication, I submit, by reference merely to the terms of the act, it is self evident that if the state court acquired jurisdiction by the institution of proceedings in June, 1915, the rule of comity applies in all its force. However, this question has been the subject of decision.

In *Peck* v. *Jenness, supra*, Jenness had acquired a lien by attachment issued out of a state court shortly before adjudication in bankruptcy. After adjudication, the assignee filed a petition in the Federal court reciting that fact and insisting that the state court lien was invalid; the Federal court thereupon decreed the lien to be invalid and made an order directing the sheriff to surrender possession to the assignee. The assignee thereupon appeared in the state court and relied upon the Federal court decree rendered in the bankruptcy matter; a demurrer to this plea was sustained and judgment rendered in favor of Jenness. The judgment being affired was taken to the Supreme Court of the United States for review by writ of error. That court, after assuming the regularity of the bankruptcy proceedings, and determining that the attachment constituted a valid

lien, and admitting that the United States Courts had exclusive jurisdiction "of all suits and proceedings in bankruptcy," decided that the action pending in the state court was not a suit or proceeding in bankruptcy, but that the state court had full and complete jurisdiction, the opinion concluding as follows:

> "It is a doctrine too long established to require citation of authorities that where a court has jurisdiction it has the right to decide every question which occurs in the case, and whether its decision be correct or otherwise its judgment, until reversed, is regarded as binding in every other court; and that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in any other court. These rules have their foundation not merely in comity but on necessity. * * * It follows therefore that the District Court had no supervisory control over the state court by injunction or the more summary method pursued in this case unless it has been conferred by the Bankruptcy Act. But we can discover no provision in that act which limits the jurisdiction of the state courts or confers any power upon the bankrupt court to supersede their jurisdiction, or annul or anticipate their judgments or wrest property from the custody of their officers. On the contrary it provides that all suits in law and equity then pending in which such bankrupt is a party may be prosecuted and defended by such assignee to its final conclusion in the same way and with the same effect as they might have been by such bankrupt. Instead of

> drawing the decision of the case into the District Court the act sends the assignee in bankruptcy to the state court where the suit is pending and admits its power to decide the case. It confers no authority upon the District Court to restrain proceedings therein by injunction, much less to take property out of its possession with a strong hand. * * * In fine, we can find no precedent for the proceeding set forth in this plea, and no grant of power to make such a decree or execute it, either in direct terms, or by necessary implication from any of the terms of the bankruptcy act; and we are not at liberty to interpolate it on any supposed grounds of policy or expediency."

While its presence or absence at the time of the rendering of this decision would not be controlling of the instant case, it is interesting to note that the present Section 720, U. S. R. S., was in force at that date in substantially its present language. And the language of the Bankruptcy Act then in force differs not materially from that of the present act in so far as concerns the question here presented.

In *Eyster* v. *Gaff*, *supra*, the Supreme Court attempted to dispel an illusion therefore existing, and seemingly now at times existent, with respect to the effect of an adjudication. Eyster was a tenant under one McClure; Gaff a mortgagee. Prior to the adjudication of McClure as a bankrupt Gaff had instituted in the state court his foreclosure action against the mortgagor, but before decree therein the bank-

ruptcy petition was filed and adjudication made; subsequently schedules were filed showing the Gaff mortgages. Gaff did not come into the bankruptcy proceedings and Eyster defending an ejectment action claimed the state court procedings were ineffective for lack of jurisdiction. The court said:

> "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in a state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court in the case before us had acquired jurisdiction of the parties and of the subject matter of the suit. It was competent to administer full justice and was proceeding, according to the law which governed such a suit, to do so. * * * The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself, by that act, not only all control of the bankrupt's property and credits but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practise to bring any person who contested with the assignee any matter growing out of disputed rights to property or of contracts, into the bankrupt court by the service of a rule to show cause and to dispose of the their rights in a summary way. This court has steadily set its face

against this view. The debtor of a bankrupt or the man who contests the right to real or personal property with him loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred jurisdiction for the benefit of the assignee in the circuit courts and district courts of the United States, it is concurrent with and does not divest that of the state courts."

There is no material difference between the act of 1867 and the present act in so far as concerns the questions here present. The foregoing excerpt from the decision in the *Eyster* case furnishes a complete answer to any suggestion which may be made that adjudication carries with it possession of the *res* to the Federal courts when there are state court actions pending more than four months prior to adjudication and to enforce liens created more than four months before.

The questions presented in the case of *Bardes* v. *Bank*, 178 *U. S.* 524, 44 *L. ed.* 1175, arose with respect to jurisdiction of District Courts of the United States of actions by trustee to recover property alleged to have been transferred contrary to provisions of subdivision e of section 67. This was prior to the amendment of the second sub-divison of section 23, which gave to the United States and state courts concurrent jurisdiction of actions of that character. Both the trustee and the bank were citizens and residents of

the state of Iowa and the District Court was held to be without jurisdiction of the action because of the provisions of sub-division b of section 23, limiting the trustee's right to sue to courts in which the bankrupt might have maintained the action. This case is valuable here as it construes the present bankruptcy act and because by its result it stands as authority against the contention that the jurisdiction of the United States courts is exclusive of all other courts when dealing with property rights of the bankrupt; and in reaching this result the Supreme Court of the United States quotes approvingly the rule announced in Eyster v. Gaff, *supra.*

Metcalf v. Barker, *supra,* furnishes further authority upon the question now being considered. An action was instituted in the state courts by Metcalf Brothers to have certain transfers of property adjudged fraudulent as to them with the object of subjecting that property to judgments recovered by them. After litigation and about the time of final judgment the debtors were adjudged bankrupts; the trustee obtained the issuance of an order to show cause why Metcalf Brothers should not be restrained from enforcing their judgment by resort to the property on the theory that by the adjudication the property became subject to the jurisdiction of the Federal courts. The injunction was issued but the Supreme Court held the interference unwarranted, the applicability of section 720 Revised Codes, U. S., being denied. The Supreme Court in

this action quoted approvingly the language of the decision in *Peck* v. *Jenness, supra,* relative to the principles of comity to be observed.

Pickens v. *Roy,* 187 *U. S.* 177, 47 *L. ed.* 128, is another decision under the present Bankruptcy Act, the Supreme Court therein affirming orders dissolving injunctions temporarily issued out of Federal courts against enforcement of a judgment rendered in a state court suit, instituted prior to adjudication. In affirming the judgment appealed from the Supreme Court expressly approved the conclusion reached by the Circuit Court of Appeals for the Fourth Circuit that the principles of comity applied in bankruptcy cases, and quoted approvingly the language of Goff, J., speaking for the court, that: "The bankrupt act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its details, provided the suit pending in the state court was instituted more than four months before the district court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy."

This Court of Appeals has recognized this rule as announced in the Pickens and Metcalf cases, *supra,* (In re Heckman, 140 Fed. 859) and its application to bankruptcy proceedings can be found recognized also in most of the other Circuit Courts of Appeals. I do not cite these decisions as they can add nothing to the effect of those listed herein. But with the present

Bankruptcy Act enacted as it is, and with the decisions rendered and above mentioned, I submit that it is settled beyond chance for dispute that the bankruptcy proceedings can have had no effect upon the general rule of comity as above exhibited.

III.

ACQUISITION OF THE *RES*.

In considering this question it is to be borne in mind that the proceeding in the state court had for its objects the enforcement of a lien upon and against specific property belonging to the Bitter Root Company and the appointment of a receiver to take over those properties and sell the same in satisfaction of the demands of appellants, marshal the assets of the Bitter Root Company, and generally conduct the affairs of that company so as to insure, as far as might be, the performance by the company of its covenants with purchasers of lands and water-rights from it. It is also to be borne in mind that the Bitter Root Company was then in possession of its properties,—the bankruptcy adjudication following over six months thereafter and the Federal court foreclosure and receivership following over eight months thereafter; that the Bitter Root Company made a *general appearance* over four months prior to the adjudication; that a special appearance had been made by appellees and that the state court had declared the existence of its jurisdiction over appellees, so far as concerned an

adjudication of their property rights, before the institution of the Federal court suit and the appointment of its receiver.

Such circumstances are sufficient to vest jurisdiction in a court and establish its possesion of the *res* to the exclusion of other courts.

In the case of *Frazier* v. *S. L. & T. Co., 99 Fed. 707,* (4th C. C. A.) dealing with a suggestion that the rule of comity was not there applicable because there was no actual possession of the property, the court said:

> "Nor is it necessary for a court of equity to take possession of the property in litigation or attempt to do so by the appointment of a receiver where the object of the suit is to set aside a fraudulent conveyance and enforce judgment liens against the land of the debtor. If proceedings have been commenced more than four months before the adjudication in bankruptcy the jurisdiction of the state court cannot be divested by the bankrupt court. This was the case of Kimberling v. Hartly, 1 Fed. 571, and the court held: 'Where an action is pending in a state court of competent jurisdiction to enforce a specific lien upon the property of a debtor the subsequent bankruptcy of the debtor does not divest the state court of its jurisdiction to proceed to a final decree in the case *and execute the same.*'"

In *Mound City Co.* v. *Castleman et al.,* 187 *Fed.* 921 (8th C. C. A.) the facts pertinent to the question here being considered are: An action in partition was filed in a state court of Missouri against persons claim-

ing interests in land; summons was issued and served upon Ben T. Castleman *after* he had sold his interest in the land to the Mound City Co., and this company thereafter instituted an action in the Federal court to obtain substantially the same relief. Error was claimed by the Mound City Company with respect to the action of the Federal court in dismissing its bill. The Circuit Court of Appeals after announcing the general rule of comity and the rule that jurisdiction once attaching the court has the right to enforce its decree and protect titles taken thereunder, said:

> "The fact clearly appeared from the petition as soon as it was filed in the state court that it would be necesary to a complete determination of the issues tendered, and to the enforcement of the decree sought, for that court to exercise its dominion over the specific land described in the petition and to divide or sell it. The *commencement of that suit*, therefore, withdrew that land from the jurisdiction of the Federal court below and from the jurisdiction of every other court, so far as necessary to give effect to the final decision and decree in the state court and gave to that court the power to retain the control over it requisite to protect the titles of those who should hold under its decree.
>
> "Although the summons in the suit in the state court was not issued until March 25, 1907, and was not served until May 13, 1907, yet the former suit was commenced and *the state court acquired the legal custody of the land on March* 20, 1907, *when the petition in that suit was filed.* A suit is commenced by the filing of the petition or bill

with the honest intention to prosecute the suit diligently provided there is no detrimental or unreasonable delay in the subsequent issue or service of process. (Citing cases.)"

As is apparent from this last decision there was not present the element of possession by the Federal court receivers such as is disclosed in the instant case: but the same Circuit Court of Appeals in *McKinney et al.*, v. *Landon et al., 209 Fed.* 300 considered this question again and had before it a state of facts which is strikingly similar to those brought before this court by this appeal.

In January of 1912 an action was commenced at the instance of the State of Kansas in a state court against the Kansas Natural Gas Company and another corporation, claiming unlawful combinations and violations of the anti-trust statutes; and in which action it was sought to revoke the charters of these corporations. The appointment of a receiver was sought to take charge and dispose of their properties. *No receiver was appointed:* the action was tried September 30 and October 1, 1912 and taken under advisement. On October 7, 1912 a foreclosure bill and creditors' action was begun in the United States Court for the District of Kansas and in this proceeding the Kansas Natural Gas Company, made defendant, confessed the allegations of the bill and receivers were appointed who thereafter took possession of the properties of the Kansas Natural Gas Company. February 13, 1913 the action in the state court was decided against the cor-

porations; receivers were appointed and were directed to go into the Federal court to assert the prior right of the state court to the properties and obtain the surrender thereof to themselves as officers of that court. Prior to this time there had been no assertion of the rights to possession resulting from the institution of the state court suit. In determining that the possession of the Federal court receivers must be abandoned to the state court receivers, the court said:

> "*The action in the state court was begun first,* but *the federal court first appointed receivers.* Did the subsequent appointment of receivers by the state court relate back so that it may be said that it was in constructive possession of the property from the time the action was commenced? It is a maxim of the law that a court having possession of property cannot be deprived thereof until its jurisdiction is surrendered or exhausted, and that no other court has a right to interfere. *It is a principle of right and of law which leaves nothing to the discretion of another court and may not be varied to suit the convenience of litigants.* Merritt v. American Steel Barge Co. 24 C. C. A. 530, 79 Fed. 228. It is essential to the dignity and authority of every judicial tribunal and is especially valuable for the prevention of unseemly conflicts between federal courts and the courts of the states. As between them it is reciprocally operative,—mutually protective and prohibitive. The most difficulty arises in determining when possession of property has been taken, when jurisdiction has attached to the exclusion or postponement of

that of other courts. *It is settled, however, that actual seizure or posession is not essential,* but that jurisdiction may be acquired by acts which, acording to established procedure, stand for dominion *and in effect subject the property to judicial control.* It may be by the mere commencement of an action the object or one of the objects of which is to control, affect, or direct its disposition. See Mound City Co. v. Castleman, 110 C. C. A. 55, 187 Fed. 921, and the cases cited. The principle often applies 'where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.' Farmers Loan and Trust Co. v. Railroad, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. * * * But where the declared purpose of an action in whole or in part is directed to specific property, and the full accomplishment thereof may require judicial dominion and control, jurisdiction of the property attaches at the beginning of the action. And it is so if dominion and control are essential to the action, though not yet exercised. We think enough has been said of the nature of the action in the state court to show that it is within the principle invoked. Judicial dominion of the combined and commingled properties of the offending corporations is vitally necessary to the purposes of the action. In no other way could the marshalling and separation be effectually accomplished."

That this has long been recognized by the United States Supreme Court as the true rule is disclosed by the decision in the case of *Heidretter* v. *Elizabeth Oil Cloth Co.*, 112 *U. S.* 294, 28 *L. ed.* 729. The court had before it for consideration two questions, viz: did the institution of an action to enforce a lien, coupled with constructive service of process, vest such a court with jurisdiction to determine rights thereto; and, present parties claiming under deeds given under decrees from state and Federal courts, the effect of principles of comity upon such asserted rights to possession. The court first determined that jurisdiction was acquired in the manner indicated, quoting from *Pennoyer* v. *Neff*, 95 *U. S.* 714, 24 L. ed. 565 to the effect jurisdiction attaches "where property is once brought under the control of the court by seizure or *some equivalent act*"; from *Cooper* v. *Reynolds*, 10 *Wall.* 308, 19 *L. ed.* 931, that "while the general rule in regard to jurisdiction in *rem* requires an actual seizure and possession of the *res* by an officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing and *in effect subject it to the control of the court*"; from *Boswell* v. *Otis*, 9 *How.* 336, that "It is immaterial whether the proceeding against the property be by attachment or bill in chancery. It must be substantially a proceeding *in rem*"; and announcing as its own conclusion:

> "But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceeding was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but *may be done by the mere bringing of the suit in which the claim is sought to be enforced*, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."

In this *Heidretter* case, it appearing that the property had been in the possession of an officer of the Federal court prior to the institution of the state court suit, it was held, upon principles of comity that the litigant claiming under Federal court decree was entitled to possession.

In the case of *Farmers L. & T. Co.* v. *Lake St. E. R. Co.*, 177 *U. S.* 51, 44 *L. ed.* 667 there was no actual seizure of the *res* by any officer of the United States court before action was commenced in the state court and the injunction issued out of that court: but the Supreme Court upheld the jurisdiction of the Federal court, saying:

> "The possesion of the *res* vests the court which has first acquired jurisdiction with power to hear and determine all controversies relating thereto and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power.

> This rule is essential to the orderly administration of justice and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before the second suit is instituted in another court, *but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets,* administer trusts, or liquidate insolvent estate and in suits of a similar nature *where, in the progress of the litigation, the court may be compelled to assume the possession and control of of the property to be affected.* The rule has been declared to be of especial importance in its application to Federal and state courts." (Citing cases.) "We think that this salutary rule is applicable to the present case."

The above language is quoted approvingly in the case of *Palmer* v. *State of Texas, supra,* in which instance there had been no actual possession of the *res* by any officer of the state court, but in which case the United States Supreme Court held that the order of the Federal District Court in appointing a receiver was erroneous, that the possession of the Federal court receiver could not be maintained and that the state court receiver was entitled to possesstion.

That the state court had, under the laws of Montana, jurisdiction of the *res* and the parties is clearly made to appear in the case of *State ex rel Mackey* v. *Dis-*

trict Court, 40 *Mont.* 359, 106 *Pac.* 1098 and *Gassert* v. *Strong,* 38 *Mont.* 18, 98 *Pac.* 497, in which latter case are quoted approvingly extracts from *Boswell* v. *Otis, supra, Pennoyer* v. *Neff, supra,* and *Heidretter* v. *Oil Cloth Co., supra.*

Again I call attention to the fact that as far as appellees are concerned it appears that they had actual notice of the pendency of the state court proceedings and of its assertion of its jurisdiction over this property: they were parties to the action and had made a special appearance therein which had been overruled. Also I again call attention to the fact that the bankrupt had more than four months prior to adjudication entered a *general* appearance in the state court suit, thereby subjecting itself and its property, then in its possession, to such orders and decrees as should emenate from the state court. The rights of the trustee, under the circumstances, could, of course, be no greater than those of the bankrupt. (Sec. 70 Bankruptcy Act).

I submit, upon the facts presented by appellants' plea filed in the District Court, and in view of the foregoing authorities, that the jurisdiction of the state court and its possession of the *res* had attached more than four months prior to the bankruptcy adjudication, prior also to the institution of the action in the Federal Court, and that if these matters shall be established upon further proceedings in the District Court appellants will be entitled to relief in one or the other of the forms sought.

Having finished my presentation of the questions raised by this appeal, I will briefly, and in conclusion consider the memorandum opinion filed by Bourquin, District Judge.

He states that "of some of the matters involved herein the state court has no jurisdiction, exclusive jurisdiction thereof being in this court, finding origin in the constitutional provisions for bankruptcy."

"These latter cannot be fully adjusted without adjustment of those asserted in the state court, and *it makes for convenience, speed and justice to have the whole dealt with by one court. The rule of comity yields thereto.*" If ever a statement was made contrary to established precedent, this is one. As above shown the Supreme Court of the United States has many times expressly affirmed the applicability of the rule of comity where jurisdiction was claimed because of subsequent bankruptcy proceedings; and as early as *Peck v. Jenness, 7 How.* 611, 12 *L. Ed.* 841, the Supreme Court of the United States squarely ruled against such a construction of the Bankruptcy Act, saying: "In fine, we can find no precedent for the proceeding set forth in this plea and no grant of power to make such a decree or execute it, either in direct terms or by necessary implication from any of the provisions of the Bankruptcy Act; and, we *are not at liberty to interpolate it on any supposed grounds of policy or expediency.*"

The District Judge refers to *Moran v. Sturges*, 154 *U. S.* 284, 38 *L. Ed.* 981, as controlling of the decision.

In the earlier portions of this brief it was conceded that the rule of comity did not apply where the jurisdiction of the courts was not concurrent. It will be observed from an examination of the opinion in the *Moran* case that there was at all times in contemplation by the state court litigants the question of determination of their rights as compared with those asserted under *maritime liens,* and the injunction of which complaint was made, was against the libelants proceeding in the United States courts. It is made definitely certain and clear by the decision in that case that the only reason for denying the application of principles of comity—otherwise proper because of the prior institution of the state court litigation—was that the state court *was entirely without authority* to adjudicate with reference to maritime liens, *exclusive* jurisdiction with respect thereto being in the Federal Courts. The United States Marshal was in actual possession of the boats, right to possession being asserted because of the existence of maritime liens. As the state court could not adjudicate with reference to those liens, it was held improper for that court to attempt to restrain libelants from proceeding in the only court which had jurisdiction.

How different is the situation here, where state courts are expressly recognized as having *concurrent* jurisdiction with the Federal courts respecting the determination of liens of the character being asserted by the parties to this proceeding.

Murphy v. Hoffman, 211 *U. S.* 568, 53 *L. Ed.* 327 cited by the District Judge was a matter wherein the possession of the court of bankruptcy had *first* attended.

Neither the *Moran* nor the *Hoffman* case is at all in conflict with the cases cited in this brief respecting the effect of bankruptcy upon this action. They are many times cited, however, as announcing the general comity rule.

Wabash Ry. Co. v. Adelbert College, supra, is also cited, the District Judge commenting upon the fact that the suit in the state court had been commenced before the Federal Court suit was instituted and possession taken by its receivers. But as has been before exhibited, the decision hinged upon the continuing effect of the Federal Court decree of March 23, 1889; and no claim was advanced, or considered, that the jurisdiction of the state court was superior because litigation was first begun therein. The contention advanced in that case was that the Federal Court had relinquished jurisdiction of the *res* by the decree of March 23, 1889.

Metcalf v. Baker, supra, also cited by the District Judge, has been herein considered and clearly does not support the decision from which the appeal is taken.

Concluding, I contend that the matter stricken from appellants' answer was vitally material to their substantial rights; that they are entitled to a determination of the truth of those statements by hearing before trial of the principal case; and that if these statements are correct, appellants are entitled to the relief sought.

Respectfully submitted,

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